



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Salmon

**Respondent:** London Metropolitan University

**Heard at:** Watford Employment Tribunal (in public; by video)

**On:** 16 July 2021 and (in chambers) 13 September 2021

**Before:** Employment Judge Quill; Ms M Prettyman; Ms J Beard

## Appearances

For the claimant: In person

For the respondent: Mr O Tahzib, counsel

## RESERVED JUDGMENT

- (1) The complaint of unlawful deduction of wages under s13 Employment Rights Act 1996 is dismissed, having been withdrawn in the course of the hearing.
- (2) The complaints of less favourable treatment contrary to Regulation 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 are not well-founded and are dismissed.

## REASONS

### Introduction

1. The Claimant is a current employee of the Respondent and brings complaints before the tribunal in accordance with Regulation 8 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (“the Regulations”).
2. His employer has decided that it will pay him at a particular fraction of the full-time equivalent (“FTE”) pay, and the Claimant’s argument, essentially, is that that fraction has been set to low, taking into account his workload in comparison to that of a full-time worker.
3. Although his claim also included an allegation of unauthorised deduction from wages based on the same argument (that he was being underpaid for the work he was actually doing), the Claimant accepted during the hearing that he was not

alleging that the Respondent had actually agreed with him that it would pay him more than it did, in fact, pay him and he withdrew that complaint.

### **The Claims**

4. That, for the academic year 2019/20, the Respondent treated the Claimant less favourably than a comparable full-time worker, contrary to the right set out in Regulation 5(1) of the Regulations.
5. That, for the academic year 2020/21, the Respondent treated the Claimant less favourably than a comparable full-time worker, contrary to the right set out in Regulation 5(1) of the Regulations.

### **The Issues**

6. Did the Claimant make a request in accordance with Regulation 6 of the Regulations for a written statement from the Respondent? If so, when?
7. If so, did the Respondent:
  - 7.1 deliberately, and without reasonable excuse, omit to provide a written statement within 21 days of the request?
  - 7.2 provide a written statement which is evasive or equivocal?  
and, if so, what inferences, if any, should the tribunal draw?
8. For each of 19/20 and 20/21, who were appropriate comparators for the Claimant, and how did the Respondent decide upon
  - 8.1 Workload
  - 8.2 Pay  
for the Claimant and the comparators?
9. For each of 19/20 and 20/21, taking account of the Claimant's workload, was the decision to pay him at 0.6 FTE treating him less favourably than the way in which the Respondent treats a comparable full-time worker? And, if so, has the Respondent shown:
  - 9.1 The treatment was not because the Claimant is a part-time worker or
  - 9.2 The treatment is justified on objective grounds.

### **The Hearing and the Evidence**

10. The Claimant made an application to add a complaint that he had been treated less favourably than a full-time employee for the academic year 2018/19. For the reasons which we gave at the time, we refused that application.
11. We had an agreed bundle of documents (in pdf format) of 300 pages. Each of the following had prepared a written statement and gave oral evidence, and were

subjected to cross-examination by the other side, and answered the panel's questions.

- 11.1 On behalf of the Claimant: The Claimant and Etienne Bresch, Principal Lecturer, Course Manager for Creative Industries and Aviation.
- 11.2 On behalf of the Respondent: Robert Fisher, HR Director for the Respondent and Christos Kalantaridis, Dean of Guildhall School of Business and Law.
12. In addition, the Claimant had submitted what was intended as statement from David Howells, a union branch officer. However, for the reasons which we gave at the time, this document (which stated the topics about which he intended to give oral evidence) did not comply with the case management orders for witness statements and we declined to allow Mr Howells attend to give evidence.
13. We spent some time in the morning discussing the Claimant's position with him in order to ensure we understood his claim properly and that we would be able to draw up a list of issues. After pre-reading, we heard the witness evidence. The hearing had been listed for one day. This was not sufficient for us to give a decision on the day and we gave permission for both parties to submit written submissions by 23 July 2021. Each party sent us submissions (which were copied to other side) by email on that date, and the panel took those into account when we met in chambers on 13 September 2021.

### **The findings of fact**

14. The Respondent is a university and the Claimant is an employee of the Respondent.
15. The Claimant has been employed by the respondent as a Senior Lecturer in Creative Industries & Law, within the Respondent's Guildhall School of Business and Law since February 2005. Between 2005 and 2016, he was employed as a Full-Time Senior Lecturer in the Creative Industries team, teaching on the Music Business BA(Hons) course, the Music Industry Management MA Masters course, the LLB Law course, and the Law (BA). The Claimant is a highly experienced, skilled, and well qualified Senior Lecturer.
16. In 2016, the Respondent decided to cease some courses, including some that the Claimant was teaching. From 2016 onwards, the Claimant has been employed as a Permanent Part-Time fractional Senior Lecturer. The Claimant does not necessarily agree with the Respondent's reasons for these decisions, but this case is not about the Claimant's move from full-time to part-time.

### Lecturer Duties and the Contractual documents

17. Mainstream academics are allocated work each year, which can include teaching, teaching related work (such as administrative work and leadership roles) and research. The balance of each type of work can change each year.
18. One of the disputes between the parties in this case is about what full-time working actually requires in practice (including, but not limited to, what hours a full-time lecturer works). The Respondent's internal HR systems work using a 35 hours per

week model. In other words, 35 hours per week is treated as “Full Time Equivalent” or “FTE”. A person deemed to be 0.5 FTE is recorded on the HR systems as being on a 17.5 hour week and 0.6 FTE is shown as 21 hours per week, etc.

19. Another dispute between the parties revolves around Formal Scheduled Teaching (“FST”). The dispute includes: what activities count as FST (and which, therefore, are non-FST) and also how many hours of FST a full-time employee is required to do. Up to the academic year 18/19, the Respondent provided formal teaching to students over 30 weeks of the year. With effect from the academic year 19/20, that was reduced to 24 weeks. Therefore the FST activities performed by lecturers were now (in the main) to be done within 24 weeks, rather than within 30 weeks. This change did not affect the pay of the Claimant or of other lecturers.
20. The template contract of employment is at pages 46-59 of the bundle. The interpretation agreement is pages 272-300. The template contract governed the Claimant’s employment and the interpretation agreement is expressly incorporated into the contract for mainstream teaching staff, including the Claimant.
21. The contract (and interpretation agreement) has clauses which specify how work allocation (and especially teaching work allocation) should be done for full-time employees.
22. The interpretation agreement includes comments about duties and allocation of work.
  - 22.1 Clause 3.1 mentions that the duties of a lecturer “include direct teaching, tutorial guidance to students’ learning, research and other forms of scholarly activity, curriculum development, educational management and administration, participation in the democratic processes of the University (committee membership etc.), participation in quality assurance procedures, recruitment and admission of students, performance review, income generating activities, and representing the University on or to appropriate external bodies.”
  - 22.2 Clause 3.2 states that the lecturer’s duties will be “determined by the appropriate Head of School/Director or their management representative, in consultation with the individual lecturer and will be reviewed regularly”. It lists factors which should be taken into account:
    - a) The full range and extent of actual duties to be performed.
    - b) Personal development needs both as a teacher and as a subject specialist, and in relation to research and other scholarly activity and to overall career development.
    - c) Teaching experience.
    - d) The number of students for whom there would be overall responsibility.
    - e) Teaching group size, with particular regard for methods requiring interaction (e.g. seminars) and the assessment implications.
    - f) Differing subject needs.
    - g) The teaching methods appropriate.

h) The number and range of the curriculum to be taught, with particular consideration given to the development and delivery of new (for the lecturer) and innovative courses.

i) The desirability of achieving a reasonable balance of activities.

j) Wider internal and external responsibilities.

22.3 Clause 3.3 states there should be fair allocation and describes some factors to be taken into account to attempt to achieve such fairness.

22.4 Clause 3.4, for “time allocation” mentions that: “Once allocated these duties should not be construed as a restrictive demarcation of responsibilities since the professional job of a teacher cannot be compressed within a rigid structure of prescribed duties, hours or days.”

23. In the contract, clause 4 deals with “Duties and hours of work”

23.1 Clause 4.2 mentions: “you are expected to work such hours as are reasonably necessary in order to fulfil your duties and responsibilities. Such hours shall be comparable with those of other employees in the institution and with those of related professional groups.”

23.2 Clause 4.3 includes: “Your duties may cover inter alia teaching and tutorial guidance, research and other forms of scholarly activity, examining, curriculum development, recruitment and admission of students, administration and related activities.”

23.3 We will set out clauses 4.5, 4.6 and 4.9 in full.

4.5. Formal scheduled teaching responsibilities should not normally exceed 18 hours in any week or a total of 550 hours in the teaching year. On occasions when formal scheduled teaching exceeds the maxima (to meet the exigencies of the service), your line manager will have regard to the nature, range, scope and disposition of your workload. However, the application of 18 hours in any one week or a total of 550 hours teaching will not apply as a maxima in subject areas where the nature of the curriculum and teaching style makes it inappropriate such as aspects of Teacher Education, Art, Design, Performing Arts, Music; in these subject areas scheduled teaching will be determined by the appropriate line manager. The allocation of more than 550 hours will follow consultation and agreement with the member of staff concerned.

4.6. Formal scheduled teaching shall only include lectures, seminars, academic tutorials, workshops, laboratory and studio practical work, field trips and formal recorded teaching meetings between research, placement and project supervisors and their students.

4.9. If you are dissatisfied with the allocation of your duties as described in paragraphs 4.2, 4.4, 4.5 and 4.7, you may refer this matter to your Head of School. If you remain dissatisfied, you may appeal to the Pro Vice-Chancellor (Academic Outcomes) and the Human Resources Director (or in exceptional circumstances, their nominees) who will have regard to fairness and equity and whose decision shall be final.

24. Paragraph 4 of the interpretation agreement aids the interpretation of clause 4 of the contract and includes various headings including “Administrative and developmental activities” and “other academic duties”. Paragraph 4.3 refers to Formal Scheduled Teaching (“FST”) and we will quote it in full:

4.3 Formal scheduled teaching (FST) (Contract clauses 4.5, 4.6 and 4.7)

4.3.1 Most lecturers, may expect formal scheduled teaching responsibilities for students within a band of 14 to 18 hours a week on average. On occasions when formal scheduled teaching exceeds the maxima (to meet the exigencies of the service), line managers will have regard to the nature, range, scope and disposition of an individual’s workload. These should not normally exceed 18 hours in any week or 550 hours in the teaching year (as detailed in paragraph 4.5 of the contract of employment). The allocation of more than 550 hours will follow consultation and agreement with the member of staff concerned.

4.3.2 However, for academic staff employed in teacher education, art, design, performing arts, or music, scheduled teaching may exceed the maxima referred to above. In these subject areas the amount of formal scheduled teaching will be determined by the relevant line manager, following appropriate consultation with individuals and, where appropriate, the recognised trade union.

25. Under the heading 4.4, “other teaching”, amongst other things, it refers to non-semester teaching and states:

This work shall be regarded as part of the 550 hours formal scheduled teaching maxima referred to in paragraph 4.2.1 above. Where it exceeds 550 hours, other than those staff referred to in the first sentence of 4.3.2 above, the member of staff shall have the right to decline such additional work. Where the member of staff agrees to work beyond the 550 FST hours, they shall be entitled to receive additional remuneration in accordance with approved rates of pay.

26. The contractual documents and the evidence from the Respondent’s witnesses satisfies us that there is not a “typical” workload allocation for a lecturer. 550 hours FST per year is the maximum, because a lecturer with that much FST will have enough non-FST work to fully occupy them for their working time. So a full-time lecturer whose focus is exclusively on teaching will be allocated work which includes 550 hours FST (or slightly less). However, 550 is the maximum and not the intended “average” or “typical” amount of FST. Some employees of the Respondent are on lecturer contracts but do very little teaching in a particular year; ie they are allocated very little FST because they are spending their time almost exclusively on research for that year. For those who do teach, if they have other responsibilities, such as being Course Leader, then the number of hours FST that will be allocated to them for that academic year will be less than the maximum in recognition of the amount of time they need to spend on Course Leader activities.
27. With effect from 1 August 2016, the Respondent treated the Claimant as having ceased to be a full-time employee and to be deemed to be 0.5FTE. On the HR systems, that was shown as being 17.5 hours per week. (Bundle page 35). For his Senior Lecturer contract, that did not change for subsequent academic years, and for the start of the year 18/19, that was still the arrangement. The effect was that the Claimant was paid 0.5 of the pay of a Senior Lecturer for that contract.

28. In February 2019, the Respondent agreed to a temporary increase in the Claimant's part-time fraction, from 0.5 FTE to 0.6 FTE. His pay correspondingly increased to being 0.6 of the pay of a Senior Lecturer. A letter to confirm the change was sent by Mr Fisher on 8 February 2019 (and received by the Claimant around the same time) and included the following:

*I am writing to confirm the changes to your appointment with London Metropolitan University as set out below.*

<i>Reason for change:</i>	<i>Temporary increase in hours of work</i>
<i>Hours/FTE:</i>	<i>From 17.5 hours per week (0.5 fte) to 21 hours per week (0.6 fte)</i>
<i>Start date:</i>	<i>04 February 2019</i>
<i>End date:</i>	<i>31 August 2019</i>
<i>Annual leave:</i>	<i>19.5 days (for the leave year 2018/2019)</i>

*Your hours of work will revert to 17.5 hours per week (0.5 fte) with effect from 01 September 2019.*

*All other terms and conditions of employment remain unchanged and will continue to apply on a pro rata basis.*

Academic Year 19/20

29. For the academic year 2019/20, the Claimant's salary reverted to being 0.5 of a Senior Lecturer.
30. The Claimant's line-manager, Mr Bresch wanted the Claimant to have a higher fraction. In order for the Respondent to decide that such an increase was appropriate, Professor Christos Kalantaridis would have had to be persuaded. Mr Bresch and also the Claimant sent several emails setting out their arguments in support of an increase.
31. One of Professor Kalantaridis's priorities when dealing with this correspondence was to check that existing resources were being used fully.
- 31.1 Based on the Claimant's contract of employment being 0.5 FTE, he wanted the Claimant to be allocated up to, but not more than, half of the maximum FST for a full-time lecturer, so 275 hours FST (being half of 550). Given that the Claimant was not doing research and was not Course Leader, Professor Kalantaridis was satisfied that an allocation based on the maximum FST was appropriate.
- 31.2 Based on the work which Mr Bresch wished to allocate to the Claimant, to the extent that that would have taken the Claimant above 275 FST, Professor Kalantaridis wanted to be sure that Mr Bresch had allocated work to other staff to ensure that they were working at capacity.

32. Since the Claimant's contract with the Respondent (as of the start of the 19/20 academic year) was for 0.5 FTE, the Claimant's line managers were not authorised by the Respondent to offer to vary his contract by increasing his fraction without first going through the vacancy approval process. The Respondent, at the time, was not automatically replacing lecturers who left. If a department wished to replace an outgoing employee, or to create a new post and fill it, the department had to first obtain approval from the Vacancy Approval Panel which consists of the HR Director, the Chief Finance Officer, and the Deputy Vice Chancellor. That panel considered the business case for the recruitment request and approves or refuses, as the case may be, taking into account the cost of the recruitment and the suggested reasons for the necessity. An increase in a part time employee's fraction required the same approval.
33. Between July and August, Mr Bresch sought an increase to the Claimant's fraction to 0.8 or 0.7 via the vacancy approval process. However, Professor Kalantaridis was not satisfied of the necessity, and in September, Mr Bresch was informed that Professor Kalantaridis had declined to submit the request to the Vacancy Approval Panel.
34. Over the next few weeks, there were various emails passing back and forth between:
  - 34.1 Mr Bresch and HR (with Mr Bresch asking HR to increase the Claimant's fraction and therefore his pay, and HR stating that this could not be done without the necessary approvals)
  - 34.2 Mr Bresch and Mr Salmon, with Mr Bresch making clear that he intended to give the Claimant teaching hours (and other duties) which he believed were 0.7 or 0.8 FTE and that he was seeking to persuade HR to increase pay accordingly
  - 34.3 Mr Bresch and Mr Salmon to Professor Kalantaridis explaining the rationale for the proposed increase from their points of view.
35. On 18 October 2019, having sought clarification, and having considered the correspondence sent to him, Professor Kalantaridis replied to Mr Bresch and declined to process a request for approval of an increase in the Claimant's fraction. In his reply:
  - 35.1 He stated that the Claimant's work for the Respondent did not include work which would justify a notional allocation of hours for any of Research (SRR and PSRR); Course Leadership; Academic Liaison Tutorship.
  - 35.2 He noted that Mr Bresch had proposed to allocate 276 hours FST to the Claimant and to additionally allocate work which would require an estimated 24 hours of undergraduate supervision. (So 300 in total).
  - 35.3 He instructed Mr Bresch to allocate the 24 hours of undergraduate supervision to another employee (and named the person, and said why that person had capacity).



- 35.4 He instructed Mr Bresch to ensure that one of the Claimant's 3 hour lecture slots would be delivered by an hourly paid lecturer.
- 35.5 He pointed out that this would mean that the Claimant was therefore going to be doing 273 FST, which was (therefore) under the 275 FST maximum that Professor Kalantaridis regarded as being appropriate for a 0.5 FTE fraction.
36. In his reply, Professor Kalantaridis also rejected Mr Bresch's suggestion that the reduction in the number of teaching weeks from 30 to 24 should be, or had been, accompanied by a reduction in the FST maximum for a full-time employee from 550 hours per year, and stated that the work allocation to the Claimant (as per his own instructions, rather than Mr Bresch's suggestions) was consistent with the allocation to other part-time staff.
37. On 23 October 2019, the Claimant met Professor Kalantaridis. Professor Kalantaridis stood by the analysis in his 18 October email in relation to the Respondent's having the contractual right to allocated up to 275 hours FST to a 0.5 fraction. However, in the course of the meeting, he was persuaded that, in addition to 270 hours teaching the Claimant could also be allocated 8 dissertations to supervise, and that there was therefore a business case to offer a contractual variation from 0.5 to 0.6 FTE. A letter dated 6 November 2019 (from Mr Fisher on behalf of the Respondent) conveyed the offer and the Claimant accepted (on or around 11 November 2019). The offer letter referred to a permanent increase in hours "from 17.5 hours per week (0.5fte) to 21 hours per week (0.6FTE)".
38. The 8 dissertations required an estimated 6 hours FST each, so 48 hours FST in total. During 19/20, the Claimant also spent around 14 hours on "industry events". Mr Bresch's and Mr Salmon's interpretation is that these 14 hours should also be counted as FST; the Respondent disputes that the work done at these events falls within the contractual definition of FST. Neither party gave detailed evidence about work exactly was done in those 14 hours, but, on balance, taking into account how FST calculations were done by the Respondent for various employees, our finding is that the Claimant's FST for 19/20 was 332 being 270 hours teaching plus 48 hours for dissertations plus 14 hours for the "industry events".
39. 60% of 550 is 330. Therefore, the Claimant's 332 FST hours for 19/20 were slightly above 60% of the figure which the contract stated was the maximum FST for a full-time employee. The decision that the Claimant was going to do more than the pro rata maximum FST was something which was arrived at with the Claimant's agreement and full consultation, following lengthy discussion. Professor Kalantaridis's email of 18 October 2019 had said that it was his "final word on the matter" that the Claimant would do 273 FST, and he was only persuaded to increase that (accompanied by the increase in fraction) by the Claimant's insistence.

#### Academic Year 20/21

40. Professor Kalantaridis had fixed the 19/20 allocations in accordance with the existing practice within the Guildhall School of Business and Law. However, for 20/21, the University introduced an Academic Workload Allocation Model ("AWAM") and it was the same for all departments. In AWAM, up to to 1591 hours

were deemed to be available for allocation. This was calculated on the basis of 37 hours per week excluding holidays and annual leave entitlement. FST was still 550 hours maximum as per the contract, so, according to AWAM, a lecturer spending the maximum amount of time on FST would be spending around 34.57% per cent of their annual working hours doing FST.

41. According to AWAM, the year was broken down as follows:
  - 41.1 A full year is  $52 \times 37 = 1924$ . However, subtracting 333 (that is  $9 \times 37$ : to reflect the 9 weeks' time off, made up of annual leave, bank holidays and holiday closures) leaves 1591.
  - 41.2 The 1591 hours is broken down into 38 weeks teaching and administrative activity (1406 hours, being  $38 \times 37$ ) and 5 weeks Research or Scholarly activity (185 hours, being  $5 \times 37$ ).
42. If 35 hours per week had been used for AWAM instead, then the corresponding break down would be (and for avoidance of doubt, this is the tribunal's calculation, not the parties'):
  - 42.1 A full year is  $52 \times 35 = 1820$ . Subtracting 315 (that is  $9 \times 35$ : to reflect the 9 weeks' time off, made up of annual leave, bank holidays and holiday closures) leaves 1505.
  - 42.2 The 1505 hours would be 38 weeks teaching and administrative activity (1330 hours, being  $38 \times 35$ ) and 5 weeks Research or Scholarly activity (175 hours, being  $5 \times 35$ ).
43. The AWAM model envisaged that as well as allocation of FST (up to the maximum of 550 hours for a full-time employee) there would be a breakdown of the non-FST hours that were work which was formally allocated by the Respondent to a lecturer.
44. The AWAM model was also intended to be used pro rata for part-time employees. So, a person contracted to do 0.6 of full-time, like the Claimant, was deemed by the Respondent to have up to  $0.6 \times 1591$  hours (954.6 hours) for which work (some FST, some non-FST) could be allocated. Professor Kalantaridis did not regard the introduction of AWAM as meaning that the Respondent could allocate more than (for example) 330 hours FST to a 0.6 FTE.
45. The AWAM model did not vary the contract between the Respondent and its employees (full-time or part-time), but rather created a more specific / rigorous approach to work allocation; an obligation for work allocation to be fair was already part of the existing contractual arrangements.
46. On 22 July 2020, Professor Kalantaridis emailed the Claimant to say that for 20/21 it was anticipated that his FST would be 270 hours. His overall working hours allocated per the AWAM model would be 771. His email attached details of the workload.
47. On 22 July 2020 at 19:40, the Claimant responded stating that what Professor Kalantaridis had sent him was incorrect, and did not match the workload for 20/21 that Mr Bresch was proposing to allocate, and supplied some spreadsheets.

Professor Kalantaridis replied the next day and told the Claimant that there were errors in Mr Bresch's documents and that, in any event, the Claimant should prepare only for the teaching as notified to him by Professor Kalantaridis and not the (higher number of hours) notified to him by Mr Bresch. Professor Kalantaridis let the Claimant know that his subject head for 20/21 was to be John Mantikas, and cc'ed Mr Mantikas.

48. Detailed emails were exchanged back and forth between the Claimant and Mr Mantikas. This led to Mr Mantikas writing to the Claimant on 17 September 2020 at 10:44, setting out the Claimant's FST for the year (including a list of courses). The FST was to be 288 hours. Not in that email, but at page 222 of the bundle, is the AWAM information for the Claimant for 2020/21. His overall allocated work was 801 hours for the year, including the 288 hours FST.
49. There was no change to the Claimant's fraction for 20/21. As mentioned above, there had been a permanent variation from 0.5 to 0.6, in 19/20 and there was no further variation in the periods relevant to this claim.

Request for written statement for particulars of reasons for treatment

50. On 29 June 2020, the Claimant wrote to Mr Fisher, the Respondent's HR director. The heading was "Part-time Workers [Prevention of Less Favourable Treatment] Regulations 2000" and the introductory paragraph stated: "I would like to bring to your attention a discrepancy regarding my pay. I believe I am being treated less favourably than a comparable full-time worker and that this infringes my right under Regulation 5 of the above Regulations, not to be treated less favourably than a comparable full-time worker." Then there is a section dealing with (current year) 19/20 and another about the proposals for the next year, 20/21. The document concluded:

I am formally writing to request the following from London Metropolitan University:

- i) Back pay of 20% owed to me for hours worked 2019/20
- ii) An increase of my 0.6 Fraction to 0.9 FTE for 2020/21
- iii) A written statement giving particulars of the reasons for the less favourable treatment as detailed above.

I would be grateful if you would provide the statement to me within the statutory 21 days defined in Regulation 6, by 20th July 2020.

51. A reply was sent by Mr Fisher on 30 June, giving some general information about the approach to work allocation and asking the Claimant if he would like the matter "escalated" to Professor Kalantaridis.
52. On 1 July, the Claimant wrote to Mr Fisher agreeing to the correspondence being forwarded to Professor Kalantaridis while also pointing out that he had discussed with the Claimant previously, and stating again that he had requested a written statement for the "less favourable treatment as detailed in my letter". There are many bullet points in the 29 June letter, but the main themes are:

- 52.1 The Claimant does more FST than some full-time lecturers (Etienne Bresch being named)
- 52.2 The Claimant's opinion that the reduction from 30 weeks to 24 weeks for the Respondent to provide lectures meant that full-time employees had gained a benefit that the Claimant had not. (The argument in the letter being that since, full-time workers had not had an 80% pay reduction, he should have had a 20% pay increase to maintain parity; as an aside, in answering the panel's questions, the Claimant confirmed that the teaching hours on the course which he taught had reduced when the change was implemented).
- 52.3 The average FST performed by lecturers was considerably less than 550, with the Claimant's argument being that if the average number of FST was (say) 400, and if a part-time employee did (say) 300 hours FST, then the appropriate fraction should be (300/400 being) 0.75 FTE.
- 52.4 For 19/20, his fraction should be worked out using 350 hours per year as the denominator.
- 52.5 He is the only subject specialist available to take on extra hours following the departure of a colleague in 2019.
53. Mr Fisher forwarded the correspondence to Professor Kalantaridis on 1 July, including the comment that the Claimant was at the maximum FST whereas some others were not. On the same day, he informed the Claimant (in writing) that he had done so, while adding that while 550 (pro rata) was the maximum for FST there were circumstances in which it could be exceeded.
54. Following receipt, and following what he thought Mr Fisher had advised, Professor Kalantaridis made attempts to accelerate the allocation of work for 20/21 with a view to giving the Claimant and other employees details of what that allocation would be. He did not write to the Claimant or Mr Fisher within 21 days of the 29 June document being received by the Respondent.
55. On 21 July, the Claimant wrote to Mr Fisher stating that he had not received the written statement and seeking to instigate the grievance procedure. On 22 July, Mr Fisher replied enclosing a copy of the grievance procedure and drawing attention to section 6, which says that a grievance can be initiated by writing to the immediate supervisor/line manager or to someone from the next level of management, if more appropriate.
56. Mr Fisher also (as he had said he would) sent a reminder to Professor Kalantaridis. He advised Professor Kalantaridis to seek to resolve the matter informally. A large number of emails passed back and forth, including the 22 July email where Professor Kalantaridis told the Claimant what his FST would be for 20/21 (the proposal being 270, at the time the email was sent) and sending details of work allocation.
57. The Claimant remained dissatisfied and, for example, on 31 July wrote to Professor Kalantaridis stating he wanted to pursue a formal grievance, a request which he repeated in further emails to Professor Kalantaridis and Mr Fisher in August.

58. On 20 August 2020, Professor Kalantaridis wrote and said, amongst other things:

Secondly, regarding the 2019/20 academic year: you did indeed raise concerns about your workload (in October of that year). I did look into it very carefully and we met and discussed it in person. At that meeting (23rd of October according to my diary), following the arguments you put forward, I did change my initial view (i.e. that there was no merit in an uplift) and uplifted your fraction from 0.5FTE to 0.6FTE. I also agreed for the uplift to be permanent rather than for one year only. My recollection of the meeting was that you agreed to it and indeed you proceeded to sign the new contract. I would like to stress that there has been no further concerns raised about your workload from that time and until your email to Robert on the 29 of June (I was forwarded the email on the 1st of July - I responded later in the month as I was on leave).

I also do note that your workload (for 2019/20) did not alter at all between what was put forward in front of me (by yourself and Etienne -your line manager at the time) before and on the 23rd of October and what you have put forward as evidence in your July email to Robert.

59. The Claimant remained dissatisfied at the outcome and on 21 August 2020, wrote to Professor Kalantaridis again seeking a formal grievance hearing.

60. Mr Mantikas was asked to look into matters. Having met the Claimant, he wrote on 17 September 2020 stating, re 19/20:

Looking back at 2019/20, based on the hours taught last year and taking into account colleagues' full workloads as well as their FST, I found that your fraction of 0.6 was accurate and fair for your allocated FST.

The FST example used in one of your emails was not representative of colleagues' full workloads or FST across the School. We have a contract that normally allows up to 550 teaching hours per full time academic per year and my calculation suggests that for your 0.6 fractional contract, your FST should have been no more than 330 hours.

As a comparison, for example, I timetabled colleagues with a 0.8 fraction with 440 hours FST.

61. The Claimant subsequently issued these proceedings.

## **The Law**

62. Regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("PTW") states:

5.— Less favourable treatment of part-time workers

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

(4) A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime.

63. So far as it is relevant, Regulation 6 PTW states:

6.— Right to receive a written statement of reasons for less favourable treatment

(1) If a worker who considers that his employer may have treated him in a manner which infringes a right conferred on him by regulation 5 requests in writing from his employer a written statement giving particulars of the reasons for the treatment, the worker is entitled to be provided with such a statement within twenty-one days of his request.

(2) A written statement under this regulation is admissible as evidence in any proceedings under these Regulations.

(3) If it appears to the tribunal in any proceedings under these Regulations—

(a) that the employer deliberately, and without reasonable excuse, omitted to provide a written statement, or

(b) that the written statement is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw, including an inference that the employer has infringed the right in question.

64. Regulation 5(1) gives part-time workers a right not to be treated less favourably than a comparable full-time worker as regards contractual terms, or by being subjected to any other detriment. “Detriment” is not expressly defined and is to be interpreted consistently with the meaning given to the word by cases interpreting the Employment Rights Act 1996 and Equality Act. A “detriment” is a disadvantage of some description to the employee, which includes, but is not limited to, financial disadvantage.

65. As per Regulation 8(6), where a claimant presents a complaint under PTW it is for the employer to “identify ground for the less favourable treatment or detriment”.

66. At paragraph 12 of the EAT’s judgment in Hendrickson Europe Ltd v Pipe [2003] 4 WLUK 467, the court stated:

[employer’s counsel’s] legal analysis of what essentially is required to constitute a breach under Regulation 5 cannot be faulted. It is, he submits, a 4 stage process. First, what is the treatment complained of? Secondly, is that treatment less favourable than that of a comparable full time worker? Thirdly, is the less favourable treatment on the ground that the worker was a part time worker? Fourthly, if so, is it justified?

67. In determining whether a part-time employee has been treated less favourably than a comparable full-time worker, then, as per Regulation 5(3), the pro rata principle must be applied, unless it is inappropriate. This means that, where a comparable full-time worker receives a particular level of pay or benefit, a part-time worker is entitled to receive no less than the proportion of that pay or other benefit which reflects the number of hours that he or she works. Remuneration and paid

time off are usually things for which the pro rata principle can be applied. If there is a particular benefit for full-time employees that cannot be given pro rata, then one option (not necessarily the only option) for the employer to comply with PTW is to supply the whole of that benefit to the part-time employee.

68. Less favourable treatment might be found to have occurred (for example) where calculations show that the part-time worker's hourly rate of pay is lower than that of an appropriate comparator, or (for example) where the worker is required to be available for work for a longer period (pro rata) than a full-time worker, for the same pro rata pay.

68.1 Thus, for example, in British Airways plc v Pinaud 2019 ICR 487, the Court of Appeal held that a part-time member of BA plc's cabin crew, P, had been treated less favourably than a full-time member because she was paid 50 per cent of full pay but was required to be on duty for 53.5 per cent of full-time hours. The liability issue thus turned on whether the respondent could justify this treatment.

68.2 Whereas, for example, in Ministry of Justice v Burton etc, the EAT and court of appeal upheld the employment tribunal's decision that there had been less favourable treatment where the claimant part-time judges got paid based on the number of days in hearings as of right, and got paid for time spent writing up judgments only on a discretionary basis, but the individuals who were deemed to be valid full-time comparators got paid both for days doing hearings and time spent writing up judgments. Neither the claimants nor the comparators had fixed contracted hours, or complete and detailed records of time spent actually working (or split between different activities when working), but these were matters of evidence, and not a legal barrier preventing a finding that there had been less favourable treatment. (And, on the facts, the tribunal decided that the less favourable treatment was not justified and also awarded a remedy which was based on a decision about how much paid writing up time there should be per hearing day).

69. Although the test for justification in Regulation 5(2)(b) is not defined by statute, the factors which the tribunal is likely to decide are relevant include:

69.1 Has the Respondent shown that it was seeking to achieve a legitimate objective and, if so, what was it?

69.2 Has the Respondent shown that the less favourable treatment to the Claimant was necessary to achieve that objective, and

69.3 Were there other means of achieving that objective that would have avoided (or reduced) the less favourable treatment

69.4 How does the importance to the Respondent of achieving the objective weigh against the specific effects on the part-time workers of the less favourable treatment

## Analysis and conclusions

70. The Claimant made a request, on 29 June 2020, that complied with the requirements of Regulation 6(1) PTW. That is our decision and in any event the Respondent concedes that.
71. The Claimant did get some written replies within 21 days, namely the emails from Mr Fisher dated 30 June and 1 July. These did supply information (about the contractual mechanisms) and did reiterate the Respondent's fundamental position that 550 hours was the full-time FST and any part-time worker's maximum was their part-time fraction multiplied by 550. These written replies did not engage directly with the Claimant's arguments about the work allocation to colleagues and the 1 July email expressly said that Mr Fisher did not have answers to those questions.
72. Other than that, the Claimant did not receive a written statement within 21 days. Further, while he had been told that the matter had been referred to Professor Kalantaridis, the Claimant was not asked for an extension of time, or given an explanation of the delay.
73. For the part of the request seeking a written statement about 20/21, we are satisfied that the employer did not deliberately, and without reasonable excuse, omit to provide a written statement (within 21 days) and did not provide a statement that was evasive or equivocal.
  - 73.1 The Respondent had not yet allocated work (FST or non-FST) for the academic year 20/21 at the time of the Claimant's request. As the Claimant knew (and as he acknowledged in the correspondence with Professor Kalantaridis) the proposals from Mr Bresch were "transient". That is, the Claimant was not definitely going to be doing the work proposed by Mr Bresch.
  - 73.2 Further, the context of the Claimant's correspondence was not that he was seeking to persuade the Respondent to give him less work than Mr Bresch proposed; he wanted to do that work, and he wanted an increase in his FTE fraction to go with it. Had Professor Kalantaridis been potentially willing to agree to both these things, Professor Kalantaridis would have needed to submit a business case for vacancy approval. It was right for him to take time to decide if that was something he was going to do.
  - 73.3 It had not been suggested by either the Claimant or the Respondent that the Claimant's fraction be reduced from 0.6 for 20/21. However, on the assumption it would remain unchanged at 0.6, Professor Kalantaridis could not know/decide what the Claimant's work allocation would be in isolation. He needed to know generally what courses were going to be provided by the Respondent, what teaching capacity the Respondent had to provide those courses, etc. The work allocation to one lecturer partially can depend on how much or how little is allocated to others.
  - 73.4 When, on 22 July, Professor Kalantaridis did answer, he was clear and unequivocal.



74. The part of the Claimant's request that relates to 19/20 requires different analysis. The Claimant was, of course, asking about treatment that he had already received, namely the hours that he had worked, and the pay that he had received, since his fraction was updated in November 2019 (with backdating to 1 September).
75. On balance, however, our decision is that the Respondent did not deliberately, and without reasonable excuse, omit to provide a written statement (within 21 days) and did not provide a statement that was evasive or equivocal. The context is that there had been extensive written correspondence a year earlier in which Professor Kalantaridis did set out his opinions about what work could be allocated to a part-time employee. At the time, he was writing and explaining why a 0.5 FTE could have (in his opinion) up to 275 hours FST (being  $0.5 \times 550$ ). He had said it was his last word on the subject, but later agreed to the Claimant's request to both allocate more work to him and to increase the fraction to 0.6. Professor Kalantaridis was not seeking to avoid setting out his position in writing. Rather it was his genuine opinion that he had already set it out clearly and unambiguously in the past. Further, the Claimant did actually know Professor Kalantaridis's methodology; he just did not agree with it.
76. For 19/20, the Claimant's FST was 332 and so was 0.6036 of the 550 maximum as per the contract. Put another way, his FST hours exceeded 330 by 0.606%.
77. The reason that this happened is set out in more detail in our findings of fact, but, in summary, the Claimant had been on a 0.5 FTE contract, and the Respondent was proposing (as of 18 October 2019) that his FST would not exceed 273 hours. That is, it would not exceed  $0.5 \times 550$ . At the time, the Respondent was satisfied that there was no business case to vary the Claimant's contract; it did not need to give him more work to do. Professor Kalantaridis was satisfied that he had sufficient existing resources. The Claimant was very keen to increase his fraction, and a discussion ensued.
78. As per clause 4.5 of the contract "the allocation of more than 550 hours will follow consultation and agreement with the member of staff concerned" (meaning that it will only follow such consultation and agreement). That is exactly what happened here. Following discussion and agreement, the outcome was two things: Professor Kalantaridis would submit a business case for vacancy approval that he had previously not wished to agree to; the Claimant would have 270 hours teaching and 48 hours dissertation work and (based on our decision that it should be treated as FST, contrary to the Respondent's stance) 14 hours for industry events.
79. The agreement that was reached was not on the ground that the Claimant was a part-time worker. It was reached because the Claimant persuaded the Respondent to allocate more work to him. Thus the Claimant does not satisfy Regulation 5(2)(a).
80. Furthermore, we are satisfied that it was not less favourable treatment. In appropriate circumstances, a full-time employee could agree to do more than 550 hours FST. The Claimant was not compelled to do more than 275, for 0.5 FTE, and was not compelled to increase from 0.5 to 0.6 FTE. Following consultation, he agreed to do 2 more hours FST than 330, just as a full-time employee could agree to work (say) 4 more hours than 550.

81. For 20/21, we have analysed the position as if the AWAM model used 35 hours per week for full-time equivalent. (as the HR systems do, and as the contractual variation letters to the Claimant do)
82. So we have used 1505 annual hours rather than 1591 as per the Respondent's model. The Claimant's contract and pay was 0.6 FTE.  $0.6 \times 1505$  is 903. The Claimant was actually allocated 801 hours in total (FST and non-FST work) for that year, so far less than the pro rata maximum of 903 (using our 35 hour per week calculations). Likewise, he also did 288 hours FST that year, so far less than 330.
83. For both 19/20 and 20/21, we reject the Claimant's suggested methodology of attempting to calculate the FST hours of an "average" full-time lecturer and using that as the denominator. For 20/21, we reject the argument that a notional benchmark of 350 hours FST should be used as the denominator.
84. The issue here is not one of difficulties of calculations or evidence. (If we were to find in the Claimant's favour on liability, we could order appropriate disclosure for the remedy phase to enable us to work out averages). The issue is that we accept the Respondent's fundamental case that there is no such thing as an "average" lecturer. Full-time lecturers have widely varying FST. Likewise, in principle, two different 0.6 FTEs could have widely varying FST. At the heart of the Claimant's complaint is that he had to work close to the maximum (slightly more in fact, for 19/20) and others did not. However, he has failed to show us that a comparable full-time worker did not also have to work close to the maximum. Eva Nicotra, for example, was a course leader, and we agree with Mr Bresch's answers in cross-examination that she was not a valid comparator.
85. Furthermore, we also accept Professor Kalantaridis's explanation that he was seeking to maximise the usage of resources. If, and to the extent that, there were any other lecturers who were doing less FST than they could have been doing, Professor Kalantaridis was seeking to level them up to amount that the Claimant was doing. He was not seeking to get the Claimant to do close to maximum because the Claimant was part-time.
86. Finally, on these facts, the Claimant's argument that the reduction in the teaching weeks from 30 to 24 disadvantaged him is incorrect. Had it actually been the case that the full-timers got reduced teaching time (and therefore more work time to spend on other things) and the Claimant had stayed on the same teaching time, then that would potentially have been less favourable treatment. However, that is not what happened.
  - 86.1 The maximum FST per year was not affected. The maximum duration of any given course was potentially affected, and the number of teaching hours on any given course was therefore reduced. However, lecturers do not teach one course only.
  - 86.2 The courses which the Claimant taught were treated the same way as other courses. Particular course which he taught were also reduced in length. The reduction in length of any given course had nothing to do with whether the lecturer was full-time or part-time.

86.3 Ultimately, the key issue is the work allocation per year, including how much FST is going to be allocated to a given worker. The change from 30 to 24 potentially affects when in the year the FST will be delivered, but – in itself – does not affect the amount. The analysis set out above in our conclusions would not be different if the Respondent had continued with its 30 week course provision.

87. For these reasons, the claims fail and no remedy hearing is required.

**Employment Judge Quill**

Date 13.10.2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19 October 2021

S. Bhudia

FOR EMPLOYMENT TRIBUNALS